No. 112 ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

REPLY BRIEF TO WYOMING'S RESPONSE TO THE STATE OF OKLAHOMA'S MOTION FOR SUMMARY JUDGMENT

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

NEAL LEADER*
ASSISTANT ATTORNEY GENERAL
CHIEF, CIVIL DIVISION

THOMAS L. SPENCER
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, CIVIL DIVISION

December, 1989
* Counsel of Record

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BEFORE THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

STATE OF WYOMING,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 112, Original
	)	
STATE OF OKLAHOMA,	)	
	)	
Defendant.	)	

OKLAHOMA'S BRIEF IN REPLY TO THE RESPONSE OF THE STATE OF WYOMING TO OKLAHOMA'S MOTION FOR SUMMARY JUDGMENT No. 112, Original

INTRODUCTION

In its response to the State of Oklahoma's Motion for Summary Judgment, the State of Wyoming has not responded to many of the main issues raised by the State of Oklahoma. It has also chosen not to dispute any of the material facts alleged to be undisputed by the State of Oklahoma in its Motion and Supporting Brief. The following propositions will be in reply to Wyoming's Response brief, and the portions of Wyoming's brief will be appropriately identified after the proposition headings.

PROPOSITION I

THE STATE OF WYOMING HAS NO STANDING TO BRING THIS ACTION AND THE FACT THAT IT WAS ALLOWED TO FILE THE COMPLAINT IS NOT DISPOSITIVE OF THE STANDING ISSUE.

(Reply to VI of Wyoming's Response Brief)

In response to Oklahoma's standing arguments, Wyoming implies that this issue has been decided since it was allowed to file its

Complaint and proceed with its suit. Oklahoma submits that the undisputed facts show Wyoming has no standing and that the issue of standing has not been finally settled.

The State of Wyoming was granted leave to file the Complaint in the instant case by the U.S. Supreme Court. The decision of the U.S. Supreme Court was not based on the undisputed facts which have been developed through discovery or the stipulation of facts entered into by the parties. The decision was based on the allegations set out by the State of Wyoming. The fact that Wyoming has been allowed to proceed in this lawsuit has no bearing on whether the undisputed facts now demonstrate whether or not an actual case or controversy exists between the State of Oklahoma and the State of Wyoming. In point of fact, the U.S. Supreme Court has recognized that simply because it has allowed a State to file a complaint against a sister State , it is not foreclosed from finding that no case or controversy exists.

In Texas v. Florida, 306 U.S. 398 (1939), the Supreme Court granted the State of Texas' motion to file a complaint against the State of Florida in 1937. A special master was appointed and the case proceeded. The Supreme Court did not decide the case until 1939 and clarified that its previous granting of the Motion to file the Complaint was not dispositive of the issue of whether or not the case was a proper one for the Court's original jurisdiction:

> While the exceptions do not challenge the jurisdiction of the Court, the novel character of the questions presented and the duty which rests upon this Court to see to it that the exercise of its powers be confined within the limits prescribed by the Constitution make it

> incumbent upon us to inquire of our own Motion whether the case is one within its jurisdiction. [Citation omitted]

306 U.S. at 405. The Special Master clearly has authority to recommend to the Supreme Court that Wyoming's case be dismissed for lack of standing.

As expected, the State of Wyoming has found no case which has recognized that a State has standing on the basis of some alleged, derivative loss of tax revenues from an injury to its taxpayers. As stated in Oklahoma's Brief in Support of its Motion for Summary Judgment, the two Circuit Courts of Appeal which have addressed this question have both found that States have no standing on this theory. The two Federal District courts in the cases cited by the State of Oklahoma in this same brief also found no state standing based on similar theories. The State of Wyoming hasn't even attempted to distinguish these cases. The State of Oklahoma would submit that the Special Master should follow the reasoning of these cases and recommend to the Supreme Court that it dismiss this case.

As the State of Oklahoma pointed out in its Brief In Chief, and as the State of Wyoming stipulated, Wyoming itself chose to lower its severance tax rate from 10.5% to 8.5% effective for the 1987 production years. In its Response Brief, the State of Wyoming makes the startling assertion that since 2% of its previous 10.5% tax automatically expired in 1986, that somehow this was not a voluntary decision on the part of the State of Wyoming to do with less tax revenue. The Special Master can take judicial notice of the fact that the Wyoming Legislature is an integral part of the

State of Wyoming and sets the policy for that State. If the alleged loss of severance tax revenues was so important to the State of Wyoming to take this case to the United States Supreme Court, why would the Wyoming Legislature simply not extend the tax or make it permanent?

The State of Oklahoma takes strong exception to the State of Wyoming trying to justify expanding its theories of the case in a Motion For Summary Judgment. As Oklahoma stated in its Brief In Chief, the State of Wyoming did not plead, or otherwise disclose, that it would also be attempting to allege injury to the ad valorem tax collections of its local governments and alleged lost coal royalties on Federal land. Obviously, had the State of Oklahoma been aware of these expanded theories of standing, it would have had the opportunity to submit discovery requests to the State of Wyoming on any <u>actual</u> damages in these areas. It would be extremely unfair to the State of Oklahoma to allow the State of Wyoming to expand the issues after the discovery cutoff in this case. The Special Master should note that none of these topics was covered in the Stipulation of Facts entered into by the parties and filed with the Special Master.

To support its position that it can expand the issues, the State of Wyoming cites irrelevant authority in support thereof. The State of Oklahoma agrees that the pleadings do not control a decision on Motion for Summary Judgment and that the Court must look at the facts in the case. This means that parties cannot rely on the pleadings alone to establish their case and must establish

their case by the facts as developed. This is not authority to allow a party to present facts and expand the issues in the pleadings upon a Motion for Summary Judgment.

Pursuant to Fed. Rul. Civ. P. 8, the allegations of the Complaint must give ". . .fair notice to the party against whom relief is sought." Reed v. Board of Education of Parkway School District, 460 F.2d 824, 826 (8th Cir. 1972). The allegations only give such "fair notice" if the allegations allow the defendant to adequately prepare a responsive pleading and prepare for trial. Riblet Tramway Company v. Monte Verde Corporation, 453 F.2d 313 (10th Cir. 1972). It is also well-settled that complex cases and cases where the constitutionality of a statute is involved, require more specific factual statements in the Complaint. 2A Moore's Federal Practice par. 8.13 at 8-78,79 (2d ed. 1989); see, Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383 (10th Cir. 1980). A party cannot raise a totally new legal issue on Summary Judgment that wasn't raised in the Complaint. Agustin v. Quern, 611 F.2d 206, 209 (7th Cir. 1979).

The alleged harm to local government ad valorem tax receipts and the alleged harm from royalties received from Federal Government land are far removed from Wyoming's original allegations of some alleged loss of severance tax revenues. There has been no notice in the Complaint of these alleged injuries. The State of Oklahoma would again assert that the Supreme Court has allowed Wyoming to file a Complaint where these issues were not raised and, if it now wants to raise them, it should get permission from the

Court to file a new Complaint and allow the State of Oklahoma to conduct additional discovery on these issues before deciding a case on Motion for Summary Judgment.

The State of Oklahoma would submit that the Special Master review this case based on the State of Wyoming's original theories of the case and recommend to the Supreme Court to dismiss this case for lack of standing.

PROPOSITION II

THE STATE OF WYOMING HAS ADMITTED THAT THE GRAND RIVER DAM AUTHORITY IS AN AGENCY OF THE STATE OF OKLAHOMA, AND ITS COMMERCE CLAUSE CHALLENGE IS INEFFECTIVE AGAINST THE STATUTE AS APPLIED TO THE GRDA BECAUSE THE STATE OF OKLAHOMA IS ACTING AS A MARKET PARTICIPANT.

(IN REPLY TO IV OF WYOMING'S RESPONSE BRIEF)

The State of Wyoming has admitted that the Grand River Dam Authority (GRDA) is an agency of the State of Oklahoma. Through the GRDA, the State of Oklahoma purchases coal. The GRDA is one of the utilities covered by the Act attacked by the State of Wyoming. Without citing any relevant authority, the State of Wyoming states that Oklahoma cannot defend its Act, as applied to purchases made by the GRDA, under the well-recognized "market participant" exception to commerce clause challenges. Wyoming argues that the State of Oklahoma cannot defend its statute as applied to GRDA purchases because the statute doesn't apply solely to GRDA coal purchases. The State of Wyoming cites no case which stands for the principle that the market participant exception is

only applicable where a state passes a special statute for its purchases.

As stated in Oklahoma's Brief In Chief, it is well settled that States may purchase goods and services from whomever they choose when acting as a market participant. Reeves, Inc. v. Stake, 447 U.S. 429 (1980). The only case cited by the State of Wyoming is South-Central Timber Development v. Wunnicke, 467 U.S. 82 (1984), which actually supports the State of Oklahoma's position. That case dealt with the State of Alaska when it was selling its own timber from State lands. The State solicited bids for prospective purchasers and in order to win the bid a buyer had to agree that the lumber taken from State land would have to b "partially processed" within the State borders before exportation. In other words, the State of Alaska was attempting to restrict downstream markets with this contract provision. Alaska attempted to defend its actions under a market participant theory citing Reeves and Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), which dealt with a Maryland statute. The Supreme Court reaffirmed its position in the market participant cases but pointed out that the actions of the State of Alaska didn't fit the exception:

> However, when Maryland became involved in the scrap market it was as a purchaser of scrap; Alaska, on the other hand, participates in the timber market, but imposes conditions downstream in the timber-processing market.

467 U.S. at 95. In the instant case, the State of Oklahoma is acting as a purchaser of a product: coal. Its actions as a purchaser and market participant fall directly within the well-

recognized market participant exception discussed in Oklahoma's Brief in Chief. The South-Central Timber case has nothing to do with the instant case since the State of Oklahoma is not attempting to affect "downstream commerce".

PROPOSITION III

OKLAHOMA'S ACT CANNOT BE STRUCK DOWN WITHOUT HEARING SOME EVIDENCE ABOUT THE LEGITIMATE LOCAL PURPOSES BEHIND THE STATUTE, AND THE STATE OF OKLAHOMA HAS ADVANCED COMPELLING LOCAL INTERESTS TO DEFEND ITS STATUTE.

(Reply to I and II of Wyoming's Response Brief)

Wyoming states that the Special Master should strike down the Oklahoma statute which it challenges on its face without any factual inquiry. This clearly would be contrary to applicable case law. The cases cited by both Wyoming and Oklahoma state that statutes which arguably discriminate against goods coming from outside the State's borders can still be upheld if the State demonstrates a legitimate local purpose in defense of the statute.

In Maine v. Taylor, 477 U.S. 131 (1986), the Supreme Court dealt with a State statute which completely banned the importation of live bait fish from outside its borders. In that case, the State was allowed to introduce evidence at an evidentiary hearing to show the environmental concerns of the State because of the presence of parasites on imported bait fish. Similarly in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), extensive evidentiary hearings were held in the District Court in allowing the State to show the legitimate purposes for the banning

of plastic milk containers. If the Special Master and the U.S. Supreme Court were to strike down the Oklahoma statute without hearing evidence, how could the State of Oklahoma ever demonstrate that the Act serves legitimate local purposes? If the Special Master does not recommend the dismissal of this case for lack of standing, the State of Oklahoma submits that he should conduct evidentiary hearings so that the State of Oklahoma can demonstrate its legitimate local purposes for the Act.

Contrary to what the State of Wyoming says in its Response Brief, the State of Oklahoma is advancing legitimate, if not compelling, local purposes in defense of its statutes. Oklahoma's Brief in Chief thoroughly goes over these legitimate local purposes. Oklahoma has pointed out that by insisting on broader markets for coal, the long-term price of coal will be more competitive. Multiple markets for a commodity will lead to competitive prices, and this is a relatively basic economic principle with which Wyoming certainly cannot disagree.

Oklahoma's act also prevents the State from becoming solely reliant on a fuel supply far removed from the State of Oklahoma. Certainly the State of Oklahoma does not have to wait for a coal strike or a rail strike before anticipating this obvious potential problem and insisting on the development of local coal supplies. While not clearly stated in Oklahoma's Brief in Chief, the State of Oklahoma would submit that because it is necessary to have a nearby coal supply for its utilities, there is not really any other

"available non-discriminatory means" to serve this legitimate local purpose. Maine v. Taylor, 477 U.S. at 138.

The third legitimate local purpose is to develop a coal source which doesn't have to be shipped hundreds of miles by one railroad company. Wyoming has either admitted or failed to controvert the fact that, at the time the Act went into effect, Burlington Northern Railroad was the only railroad shipping coal out of the Powder River basin in Wyoming and destined for Oklahoma. The State of Wyoming also failed to controvert the fact that between 50 and 75% of the delivered price of coal in the last several years has been for rail transportation and not for the coal itself. The State of Oklahoma would submit that relying on one railroad results in an inherent lack of competition and justifies the passage of the Act.

The State of Wyoming has tried to mischaracterize Oklahoma's argument by its statements relating to the regulation of railroad rates. The State of Oklahoma has never attempted to regulate rail rates nor has it ever argued that this statute helps to regulate rail rates. The Act makes it possible to rely less on rail transportation so that Oklahoma utilities won't have to pay outrageously high rates.

The State of Wyoming also attempts to argue that the Act is not a part of Oklahoma's regulation of electrical utility rates. To accept this argument the State of Wyoming would have the Special Master believe that the number of coal markets has no impact on the price of coal. It would then have the Special Master believe that

the price of coal has no impact on utility rates. It should be obvious that the coal supply for Oklahoma's four electric utilities with coal-fired generating plants is an integral part of the price of generating the electricity and the rates charged to consumers to recoup these costs of generation.

The State of Oklahoma takes strong exception to the affidavit and report of Linda Rathbun submitted by Wyoming. Neither Ms. Rathbun nor the State of Wyoming has apparently re-read the very Act that they are attacking. The State of Wyoming has incorrectly stated in many places in its brief, that Oklahoma's utilities can pass on any potential price increases as a result of the Act to ratepayers. The Act states, ". . .The cost to the entity shall not increase the cost to the consumer. . ." 45 Okla.Stat., § 939.1 (1989 Supp.). The statute itself specifically forbids the ratepayer from paying higher rates, and the only court to construe the statute has so found.

In Northeast Oklahoma Electric Cooperative, Inc., et. al v. The Grand River Dam Authority, et. al., Case No. C-88-127 (Dist. Ct. Craig County, Okla.), a utility consumer attempted to challenge the Act challenged by Wyoming in this case. The Oklahoma Attorney General intervened in the case and filed a Motion to Dismiss for lack of standing. In granting the Motion to Dismiss, the State District Judge construed the Act as follows:

> 4. A reading of the provisions set forth above clearly demonstrates that any increased cost to the utility, brought about by burning a minimum of 10% Oklahoma mined coal, is not to increase the cost to the utility consumer. In point of fact, the language of the statute specifically prohibits such increase in cost.

> Accordingly, the statute, by its own terms, has no direct effect upon utility consumers, such as Plaintiffs herein. As the statute by its very terms does not affect consumer rights, consumers lack standing to challenge the statute's constitutionality.

(See "Journal Entry of Judgment" dated September 2, 1988, in accompanying Appendix). The Act forbids the ratepayer from paying any additional cost even assuming that utilities paid more for Oklahoma coal. It should be pointed out that there is nothing in the record that, on the average, Oklahoma coal is higher in price than Wyoming coal. As Ms. Rathbun bases her entire Affidavit on the faulty assumption that increases in price, if any, can be passed on to the consumer, her entire affidavit may be disregarded.

The State of Oklahoma would also point out that the affidavit of Ms. Rathbun is based on facts which are inconsistent with the facts as stipulated by the State of Wyoming. In at least one instance her report appears to be biased. A few examples of these inaccuracies and bias are instructive.

In her report entitled "Estimate of the Costs to the Oklahoma Ratepayer of Oklahoma's 'Buy-local Coal' Law", she implies in part II entitled "Conclusions" that the Act will result in increased pollution control cost. This is directly contrary to the admissions of Wyoming's other "experts" that all Oklahoma plants can burn a 10%-90% Oklahoma to Wyoming coal blend without violating any emissions standards. It is also contrary to the uncontroverted Affidavit of James Hamm, who was the Construction Engineer and helped design the GRDA No. 2 plant.

On table 3 attached to her report, Ms. Rathbun has a single asterisk by several of the numbers appearing on the table. The single asterisk, according to the legend, is the "1988 actual average price paid by Oklahoma utilities". The figure of a $1.014 is supposedly the actual average spot coal price paid by Oklahoma utilities for Wyoming spot coal in 1988. However, pursuant to Stipulation Number 17 of the Stipulations agreed to by Wyoming and Oklahoma in this case, no Wyoming spot coal was sold to any Oklahoma electric utilities in 1988. In fact, in the two years previous to 1988, only a single utility, at one of its two plants purchased any Wyoming spot coal. (See Stipulation No. 15). Not only is Ms. Rathbun's data suspect but her use of a single utility's spot coal purchases at only one of its plants is hardly a representative sample.

The most egregious indication of bias appears at page 4 of Ms. Rathbun's report under the heading "Coal Price Assumptions". Ms. Rathbun states the following in the fourth sentence of the first full paragraph under that heading:

> Second, we assumed that, on average, Oklahoma utilities could purchase up to 10.51% of their coal supplies (i.e., on a BTU basis) on the spot market or under a new contract and were only required to purchase 89.49% percent of the requirements under their current long-term contracts with Wyoming coal suppliers.

This sentence contains a footnote reference to the bottom of the page under footnote 8 where Ms. Rathbun has selected the year 1985 as a representative year for spot coal purchases. The State of Wyoming and the State of Oklahoma, in Stipulation No. 16,

stipulated to spot coal purchases from 1984 to 1987. The years 1984 to 1986 are relevant because the Oklahoma Act under attack in this case was not yet in effect. If one adds up the total spot coal tons purchased in each of those years, one will find that in 1984, all of Oklahoma utilities purchased a total of 503,590 tons on the spot market from Wyoming. In 1985, all Oklahoma utilities purchased 1,311,600 tons of spot Wyoming coal. The following year all Oklahoma utilities only purchased 102,120 tons of Wyoming spot coal. With all three of these years to choose from, Ms. Rathbun has conveniently selected 1985 where the spot ton purchases were over 2 1/2 times the level of the previous year and 13 times the number of the year immediately following. This is extremely relevant to Ms. Rathbun's preconceived conclusion because her table assumes a rather low dollar figure ($1.014) for spot ton purchases compared to $1.50 for Wyoming contract purchases. Obviously, if she assumes more spot Wyoming coal is purchased, it will magnify the alleged impact of the Act because of the lower assumed spot coal price. The State of Oklahoma submits that this demonstrates a bias on Ms. Rathbun's part and the Special Master should not be impressed by the fact that she used a complicated computer model to come up with faulty conclusions. As stated previously, the entire affidavit is based on the incorrect assumption that rate-payers in Oklahoma can pay higher rates because of the Act. That would assume that utilities are paying more for Oklahoma coal which is, in and of itself, not established. Oklahoma would submit that the well-recognized phrase in the computer industry "garbage in-

garbage out" is an appropriate characterization of Ms. Rathbun's conclusions attached to her affidavit.

Contrary to Wyoming's bald assertions, the State of Oklahoma has preeminent concern for its ratepayers. The State of Oklahoma submits that it has produced and supported the legitimacy of its local purposes advanced in defense of the Act and the Act is constitutional.

PROPOSITION IV

OKLAHOMA STATUTE IS AN INTEGRAL PART OF ITS REGULATION OF ELECTRIC UTILITY RATES.

(Reply to III of Wyoming's Response Brief)

The State of Oklahoma chooses not to specifically respond to III of Wyoming's Response Brief and would submit that its argument on this point contained in Proposition III of its Brief in Support of Motion for Summary Judgment adequately address the legal issues.

PROPOSITION V

THERE ARE NO MATERIAL FACTS IN DISPUTE ON THE QUESTION OF WYOMING'S LACK OF STANDING, BUT THERE ARE MATERIAL FACTS IN DISPUTE ON THE MERITS OF WYOMING'S CONSTITUTIONAL CHALLENGE.

(Reply to V of Wyoming's Response Brief)

The State of Oklahoma agrees that there are no material facts in dispute regarding Wyoming's lack of standing. The State of Wyoming doesn't sell coal. Any loss of severance tax revenue has been self-inflicted or is the result of declining coal prices. The amount of Oklahoma coal sold to Oklahoma utilities compared with the State of Wyoming's total coal production is insignificant.

(.43% to .52%). Wyoming's severance tax is not on the sale of coal and is assessed whether the coal is sold or not. The facts on the merits of Wyoming's constitutional challenge are in dispute and do require a hearing should the Special Master in the Supreme Court disagree with the state of Oklahoma standing argument.

The State of Wyoming has attempted to show that the burning of Oklahoma coal results in higher operational costs. The Flaim/Hemphill Report, relied upon by Wyoming, and the James Hamm Affidavit in support of Oklahoma's Motion for Summary Judgment conflict on this point. The State of Wyoming has spent a great deal of time in its response to Oklahoma's Summary Judgment Motion to imply that utility ratepayers will actually pay higher utility rates as a result of Oklahoma's Act. Wyoming's assertion is based on conjecture and false assumptions, and the Act on its face forbids ratepayers from paying higher cost. This constitutes a material fact in dispute.

Wyoming states that Oklahoma's Act is not related to the regulation of utility rates. The State of Oklahoma disagrees and this fact is part of Oklahoma's defense of its statute.

In summary, if the Special Master does not agree with the State of Oklahoma's standing argument, this case is inappropriate for summary judgment on the merits of the statute. The State of Oklahoma should be allowed to present evidence to show its legitimate local purposes.

CONCLUSION

On the basis of the foregoing arguments and citations of authority, the State of Oklahoma respectfully submits that the special master should recommend granting judgment in favor of the State of Oklahoma. Should the Special Master elect not to make such a recommendation, the State of Oklahoma submits that the Special Master conduct a hearing or hearings to hear further evidence from the parties and particularly to hear evidence from the State of Oklahoma on the legitimate local purposes of Oklahoma's Act.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

NEAL LEADER
ASSISTANT ATTORNEY GENERAL
CHIEF, CIVIL DIVISION

THOMAS L. SPENCER
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, CIVIL DIVISION

112 State Capitol Building
Oklahoma City, OK 73105
Telephone: (405) 521-3921

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF MAILING

On this _____ day of December, 1989, a true and correct copy of the foregoing was mailed to:

Mary Guthrie
Steve Jones
Senior Assistant
Attorneys General
123 Capitol Building
Cheyenne, WY 82002

_____
Neal Leader

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